Rule ratio and the post-Rule ratios is statistically highly significant. This is illustrated in Figure 12. The average of the ratios for 1969/70 and 1970/71 is .954. The ratio for 1972/73 is .939, remarkably similar to the ratio in 1976/77 (.938). This means that television viewing during the access period in 1972/73 and 1976/77 was about 1.5 percentage points below the pre-Rule norm. Because this method controls for the various other factors that might have affected viewing between 7:30 and 8:30 p.m. in the seasons after the Rule, it is reasonable to attribute all of this 1.5 percentage point difference to the effects of the Rule. Those effects include the elimination of first-run network programming during the access period and the inability of network affiliates in the top-50 markets to show off-network programming during the access period. Put slightly differently, for the ratio of viewing before 8 p.m. to viewing after 8 p.m. to have stayed constant, the number of HUTs during 7:30–8:00 p.m. would have to have been approximately 1 percent larger than it was during the two post-Rule seasons considered here. Given the number of TV households in this period, this implies that about 600,000 additional households would have been watching television during 7:30–8:00 p.m. but for the Rule.

5. Estimating the dollar welfare loss to viewers

As noted above, counting only those households that turned off their television sets is an understatement, and probably a substantial understatement, of the impact of the Rule, because it omits the losses suffered by those who mitigated their loss with lower-value programs. Moreover, counting households is of course not the ideal way to measure the welfare effect of any public policy. From an economic point of view, the impact on viewers is best measured by changes in their consumer surplus, or willingness to pay.[84] There is no way to measure these consumer surplus changes directly for the Rule, but it is possible to perform a rough calculation that at least illustrates the viewer losses imposed by the Rule.

---

84 *See*, for example, JACK HIRSCHLEIFER & AMIHAI GLAZER, PRICE THEORY AND APPLICATIONS, 189 (5th ed. 1992).

There appears to be only one study of viewer willingness to pay for television that is contemporaneous with PTAR. In a Brookings volume, Noll, Peck and McGowan concluded that viewers in 1971 valued network signals at 5.1 percent of income.[85] This result has not been reproduced or checked. It is simply accepted as an assumption for purposes of the calculation below.

The effect of PTAR was to replace network programming with non-network programming, so one must subtract from the preceding estimate 1.3 percent of income, which is the collective value Noll, Peck and McGowan attribute to three independent signals. The difference in value between three network signals and three independent signals is 3.7 percent of income.

In 1971 there were 62.1 million TVHHs, and approximately 57 percent of all network viewing was in prime time. Given personal income in 1971 of $4,302 per capita, and 3.1 persons per household, it is possible to calculate the incremental value to viewers of having to give up prime-time network programming in exchange for independent station programming. One seventh of prime-time network programming was lost due to PTAR. The result is lost consumer surplus of $2.5 billion per year, in 1971 dollars. This translates into $8.5 billion per year in 1994 dollars.[86]

In short, this rough calculation suggests that over $8 billion per year in viewer welfare was lost because of the Rule, starting in 1971. Even if Noll, Peck and McGowan's estimates are too high by an order of magnitude, there was still a very considerable adverse impact on viewer welfare from the Rule. There appear to be no later measures of viewer valuation of network versus independent broadcasts, and therefore there is no basis to calculate this loss in later years. But if the estimates above are accurate, and if the loss has continued at its initial rate, the Prime Time Access Rule has cost American viewers more than $200 billion.

---

85 NOLL et al., *supra* note 58, at 288.

86 These calculations are set out in more detail in Appendix J.

C. Effects on competition

A market economy relies on competition among rival suppliers to produce at the lowest cost the quantity and quality of goods and services that society desires. Competition spurs firms to serve their customers efficiently and to innovate. When competition is hindered, society is deprived of these benefits. PTAR restrains competition in several ways. By its effective prohibition on network programming during the access period, PTAR reduces competition among ABC, CBS and NBC and between these networks and other sources of video entertainment. By creating perverse incentives, PTAR reduces the competition provided by new networks. It also reduces the competition facing producers of first-run programming and competition among television stations. In addition, PTAR interferes with the competitive functioning of the market for off-network programming. Harm to competition in each of these areas results in obvious injury to consumers and to society as a whole.

The viewing public chiefly bears the injury caused by these obstacles to competition. Viewers tuning to a network affiliate during the access period will not see network programming. This causes a loss for many viewers because such programming is likely to have been of higher quality and greater appeal than what is offered. If viewers tune to an independent station during the access period, they will likely see lower quality programming than would have been offered if these stations had to respond to network programming or, in the top-50 markets, to off-network programming on the network affiliates.

1. Competition among ABC, CBS and NBC

The classic example of reduced competition is a cartel or collusive agreement among competitors. Typically, such an agreement seeks to raise prices in the market by reducing the amount of goods or services provided. Though there is no evidence of collusion among the broadcast networks, PTAR has ironically achieved a reduction in competition among them similar to what might have been achieved if they had agreed among themselves to reduce output. Before PTAR, the networks provided their affiliates with first-run programming during the access period. By preventing the broadcast networks from providing programming in the access period to affiliates in the top-50 markets, PTAR has made it uneconomical for ABC, CBS and NBC to provide any programming at all in this period. The reduction in first-run prime-time programming (and consequently of network audiences for sale to national advertisers) achieved by PTAR is one that could otherwise only have been achieved through the suspension of normal competition among the networks.

A restriction of output, especially one enforced by an outside agency, should be welcomed by sellers. In urging the repeal of PTAR, ABC, CBS and NBC are seeking relief from this anticompetitive restriction. If these networks competed only among themselves, such a position would be paradoxical because it would be contrary to the networks' interests. This paradox is resolved when it is recognized that ABC, CBS and NBC compete today not just among themselves but with many other advertising vehicles and sources of video entertainment, including new and emerging broadcast networks, cable networks, pay-per-view movies and home video. ABC, CBS and NBC thus seek to be freed from the artificial constraint PTAR imposes on their programming activity so they can respond more effectively to present and future competition.

2. Competition from new networks

Among the sources of competition facing ABC, CBS and NBC are new broadcast networks. As noted earlier, Fox has established a successful network and several other networks have just been launched. In the absence of regulatory distortions of the competitive process, Fox and other networks would have the ability to offer a full range of network programming, similar to that of ABC, CBS and NBC. Fox has chosen, however, to limit its prime-time programming to 15 hours per week, far less than the 22 hours per week currently offered in prime time by ABC, CBS and NBC. It can be postulated that the principal reason that Fox has capped its programming hours is to avoid being classified as a network, because Fox would then be subject to the FCC PTAR strictures that now reduce the competitive effectiveness of ABC, CBS and NBC. In this way, PTAR provides incentives for new networks to remain small, thus limiting the competition Fox and other new networks would otherwise provide to ABC, CBS and NBC.

3. Sources of first-run programming

Competition provides a spur to greater creativity, efficiency and performance. Non-network producers, packagers and syndicators of first-run programming for the access period compete among themselves, but PTAR has restricted the range of competition they would otherwise face. Specifically, independent producers and syndicators can sell programming to ABC, CBS and NBC affiliates during the access period without competition from programming that these networks might offer or produce or, in the top-50 markets, from off-network programming. Even though many affiliates might choose network programming in preference to the alternatives, the competitive process itself is important in maximizing consumer welfare.

4. Independent stations

Television stations, like program producers, are spurred by competition. Television stations compete for audiences primarily through the quality of their programming. PTAR has artificially handicapped network affiliates' ability to compete during the access period by reducing their programming options. These handicaps reduce the competition facing Fox, UPN, and WB affiliates and whatever independent stations remain, thus reducing the incentives for these stations to provide desirable programming in the access period. Likewise, the competition that ABC, CBS and NBC would provide to cable networks during the access period is reduced, thus decreasing their incentives to provide desirable programming. Although PTAR handicaps ABC, CBS and NBC affiliates to benefit independent stations, there is no evidence that this benefit has been sufficient, given the many other factors at work, to account for any portion of the growth of independent stations. Further, nowadays audiences lost to ABC, CBS and NBC affiliates on account of the Rule go in large measure to benefit cable networks rather than independent broadcast stations. Finally, even if PTAR continues to benefit Fox affiliates and independent stations, surely continued sheltering is unwarranted.

5. Off-network syndication

By prohibiting ABC, CBS and NBC affiliates in the top-50 markets from carrying off-network programming during the access period, PTAR has reduced the overall demand for off-network programming. This reduction in demand translates directly into reduced earnings for off-network programming. Off-network earnings are a significant part of the total return that a network show, whether produced by the network or supplied by others, can expect to make. According to one analysis, the present value of network license fees from a successful 30-minute sitcom is estimated at around $50 million during the first five years.[87] The estimated present value of syndication rights for episodes produced in those five years ranges from $32 million to $126 million. In other words, syndication revenues can range from about two thirds to over 2.5 times the value of original network broadcast. When curtailed syndication opportunities reduce total earnings, the incentive that a program producer has to invest in program quality is reduced. By reducing this incentive, PTAR reduces the quality of first-run shows the public sees on ABC, CBS and NBC.

6. Competition for programs

While programs that have been shown on ABC, CBS and NBC may not be shown on network affiliates in the access period in the top-50 markets, programs previously shown on the Fox network may. Discriminating against off-network programming increases the back-end value of Fox programming, since it faces reduced competition from ABC, CBS and NBC off-network programming. As pointed out above, increasing the total amount that a program can earn is likely to lead program producers to increase the cost and quality of the programming for any given network license fee.

---

87 Derived from Paul Kagan Associates, *Big Risk, Big Rewards in Syndication Business*, TV PROGRAM INVESTOR, Aug. 31, 1994, at 35.

This means that programs shown on Fox will benefit from an artificial impetus to their quality, just as the quality of ABC, CBS and NBC programming is depressed. This distortion in quality results in further warping of the competition between Fox and ABC, CBS and NBC.

7. Program suppliers

Reducing the back-end value of off-network programs is a consequence of the restriction on broadcasting off-network programs during the access period in the top-50 markets. Total payments to suppliers of network programs are reduced. PTAR's effective prohibition on network programming in the access period likewise reduces the demand for programming by restricting purchases by the networks. Both distortions reduce revenues flowing to program suppliers, a group PTAR was ostensibly intended to benefit.[88] For the reasons indicated above, expenditures on the programming that replaces ABC, CBS and NBC broadcasts are not likely to compensate fully for this lost revenue.

8. Multiple advantages for Fox and Fox affiliates

Because affiliates of ABC, CBS and NBC cannot show off-network programming during the access period, Fox and Fox affiliates gain a competitive advantage in several ways, some mentioned above. First, Fox affiliates are shielded from the competition of affiliates of ABC, CBS and NBC that would choose to show off-network programming during the access period. A second, related benefit is that Fox affiliates are able to buy off-network programming at a lower price, since demand by ABC, CBS and NBC affiliates is reduced. Third, as a network, Fox is able to attract more desirable programming than it otherwise would because PTAR increases the syndication value of off-Fox programming both absolutely and relative to off-ABC, off-CBS or off-NBC programming. Fourth, this increase in syndication value benefits Fox as a studio when it produces shows for its own network. Fifth, Fox is given an artificial advantage in competing for independent stations

---

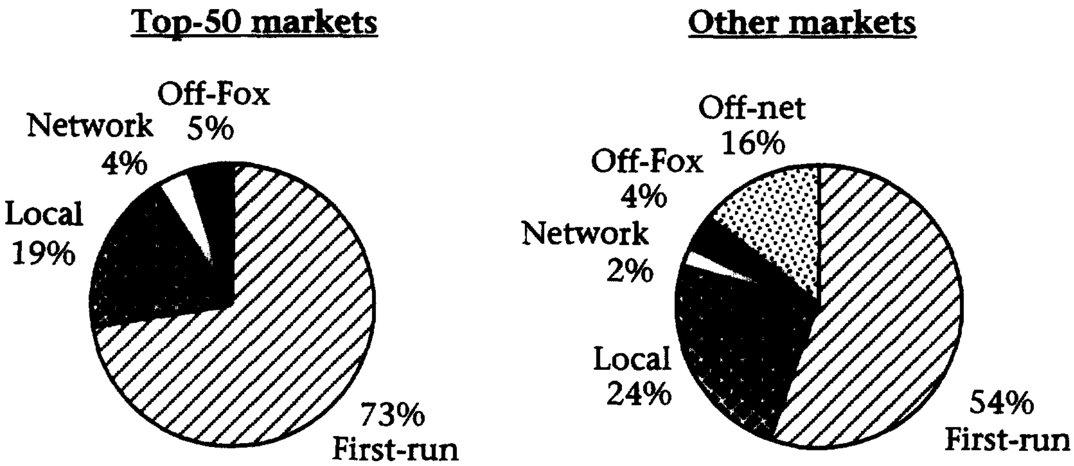
88 Even though total payments to program producers would increase in the absence of PTAR, some producers may advocate that PTAR be retained. The interests of a relatively small group of producers that have prospered in a sheltered environment should not be confused with the interests of producers as a whole.

seeking network affiliation. Stations that affiliate with Fox will be free of the Rule, while stations that affiliate with ABC, CBS or NBC will not. Of course, all of these points apply as well to the two newest broadcast networks, UPN and WB.

9. Top-50 market affiliates

PTAR's prohibition of off-network programming on top-50-market network affiliates during the access period has clearly moved these stations away from their normal and presumably economically efficient competitive equilibrium. This is best demonstrated by comparing network affiliates in the top-50 markets with those in smaller markets. Among network affiliates outside the top-50 markets, 16 percent of broadcast hours in the access period consisted of off-network programming. See Figure 13. It seems clear that if PTAR were not in place, a significant number of network affiliates in the top-50 markets would also be showing off-network programming in place of what is currently shown. Eliminating PTAR would permit these stations to compete for the most attractive programming. Stations also would be better able to choose programming that maximizes the audience flow from one program to another, thereby competing more effectively for audiences during prime time and possibly increasing the size of the total television audience.

Figure 13 Access hour programming of network affiliates[89]



---

89 Source: NIELSEN NSI NOV. 1994 SWEEP, Appendix H, Table H-1. News and other PTAR-exempt programming accounts for the indicated network share.

IV. Costs and Benefits of PTAR: An Assessment

Analysis and data show that PTAR does not achieve any of its stated purposes: PTAR does not enhance competition in the independent production of television programs; PTAR does not effectively address any perceived problem of network power over affiliates; PTAR is not necessary to insulate independent stations from competition today; and PTAR does not enhance diversity. There simply are no offsetting benefits to justify PTAR's anticompetitive effects and harm to viewers' interests.

A. Insulating first-run suppliers from competition

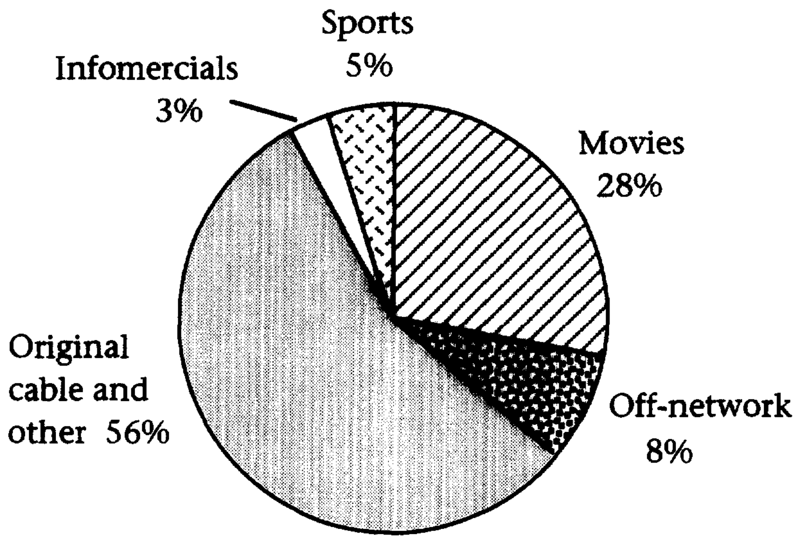
One of the purposes of PTAR was to stimulate a healthy industry of producers, distributors, packagers and syndicators independent of ABC, CBS and NBC. Yet it is far from clear that PTAR was in any sense necessary to achieve this. For example, the creation and development of a first-run syndication industry, contrary to the Commission's apparent belief in 1970, did not require PTAR. As Krattenmaker and Powe put it, "[the first-run syndication] industry has always been viable, capable of supplying programs to stations that could not or would not choose network or local programming. The rule gave more business to the first-run syndication industry but did not empower it to produce programs that it lacked capacity to create."[90]

Even if one assumes PTAR was once useful in accomplishing the Commission's goal, clearly the non-network program production and distribution industry would continue to flourish if the Rule were abolished. As shown above, competition in the independent production industry is robust, as is competition among broadcast networks and other national distributors of

90 KRATTENMAKER & POWE, *supra* note 4 at 287, citation omitted.

video program services. In particular, as indicated above, cable networks now have a substantial demand for non-network programming. Data on program schedules for 94 national and regional English-language cable networks were analyzed for a representative week in 1995. The breakdown of programming is shown in Figure 14. Cable's demand for video programming will doubtless remain strong absent the Rule.

Figure 14 Sources of programming on 94 cable networks[91]

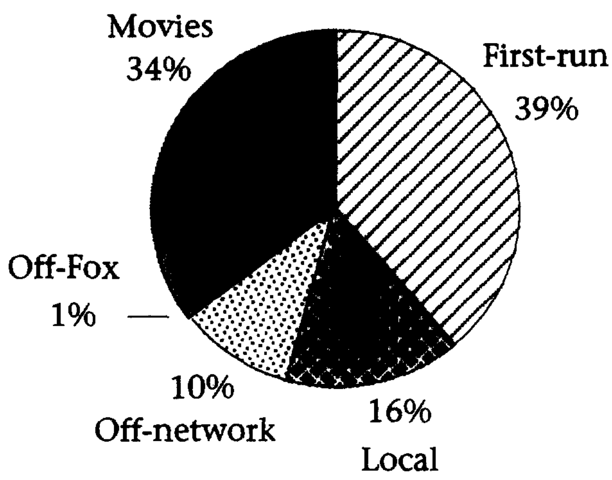


There is no basis for concern that ABC, CBS and NBC could inhibit competing program sources given the vast growth in outlets since the Rule was promulgated. In particular, there is no basis today for the belief that the producers of original video programs require government-aided access to the top-market affiliates of ABC, CBS and NBC to get their programs before the public. There is no other basis for continuing protectionist treatment of first-run syndicators. Absent the Rule, independent broadcasters would likely counter-program first-run network programs on ABC, CBS or NBC affiliates with first-run syndicated programming during the access period. Many independents already broadcast first-run syndicated programs in prime time opposite first-run network broadcasts. See Figure 15. Among

91 Source: Appendix B. Also see Appendix A, Table A-15.

non-Fox independent stations in the top-50 markets, 39 percent of prime-time hours were first-run syndication. Indeed, at this point the overall impact of PTAR on the production industry is negative because the Rule prevents the networks from buying more independently-produced programming, which artificially reduces the total revenues of the production industry.

Figure 15 Program sources for prime-time broadcasts of top-50-market non-Fox independents[92]



B. Network power over affiliates

As shown above, ABC, CBS and NBC do not dominate their respective affiliates. Instead, networks and their affiliates are engaged in a mutually beneficial economic relationship to which each contributes. There is no reason, based on market structure, to suppose that any network could dominate the relationship. Nor is there behavioral evidence of dominance. In particular, high clearances by affiliates of network-supplied prime-time programming enhance viewer welfare as well as network and affiliate profits. Even if it were felt that ABC, CBS and NBC continued to dominate their affiliates, PTAR does not correct the problem. The enforced "freedom" from the

92 Source: Appendix H.

networks afforded to affiliates by PTAR clearly is not in the public interest. ABC, CBS and NBC affiliates are artificially encouraged, indeed compelled, by PTAR to show less desirable, less costly programming knowing that no competitor can offer more desirable, *i.e.*, first-run network, programming. This result is perverse from a public policy standpoint. To "protect" affiliates from alleged network dominance "so that the public interest in diverse broadcast service may be served,"[93] PTAR reduces affiliates' choice of program sources, with the result that the public is made to suffer by denying viewers what they most want to see.

C. Insulating independent stations from competition

It is neither necessary nor desirable today to insulate independent stations from competition. Further, protection such as that offered by PTAR distorts economic efficiency and viewer welfare. The infant industry argument that independent stations require insulation from competition made little sense in 1970 and makes none today. Infant industry protection, in some specialized circumstances, can provide net economic benefits to society if some firms could not otherwise weather initial competitive pressures and need time to develop to minimum efficient size. In some cases the gains to consumers in future competition from the nurtured "infants" can warrant a temporary government-mandated lessening in competition. There is no basis whatever to believe that the infant industry model applies to television stations of any sort, and no such showing was made in 1970. Moreover, in no case is it prudent public policy to maintain a protected industry segment as perpetual infants. If full competition is never restored, the public can never recover the lost benefits from diminished competition.

Independent television licensees now have had 25 years to grow in number from 62 to over 400 stations. Independents as a group have grown strong, a result of forces to which PTAR can hardly have contributed materially, and the independent industry is no longer an infant. Nor will the independent industry be inappropriately disadvantaged if PTAR is removed. The burden

93 Report and Order in No. 12782, 23 FCC 2d 382, 397 (1970).

should be on those who want "protection" to continue beyond 25 years to show how the public could gain from continued anticompetitive regulations.

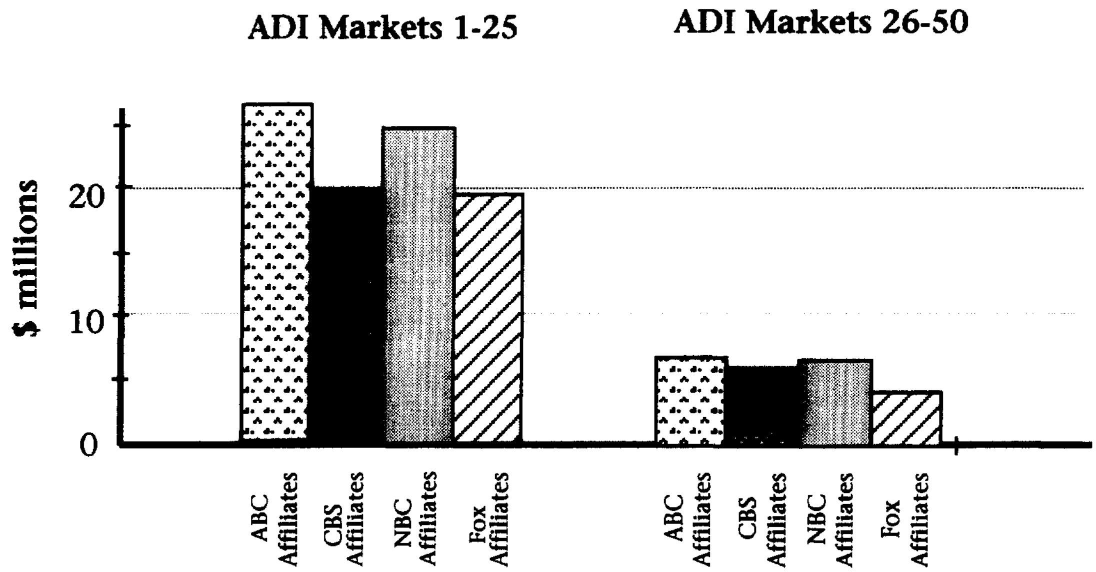
The Commission has candidly admitted that PTAR has distorted competition and afforded independent stations a competitive advantage.[94] This competitive distortion is not justified today, and given the emergence of alternative media and networks, the distortion results in ever greater competitive harm. In particular, PTAR hampers the ability of ABC, CBS and NBC affiliates to compete with cable networks and other media, almost all of which are supported at least in part by direct payments from viewers. As a result, restrictions that reduce the competitiveness of affiliates and their networks threaten the vitality of free, over-the-air television. Moreover, PTAR does not insulate independent stations from the true long-term competitive threats to all broadcasters: national cable networks, DBS and other new video media. These new viewer-supported media promise an ever-increasing array of diverse programming, much of which will cater to specific, narrow viewer tastes and afford direct competition to the fare of many independent television stations.

PTAR indiscriminately insulates *all* independents from competition, regardless of their economic status. There can be no reasoned basis for protecting successful independent stations, particularly independent VHF stations and "independent" stations affiliated with the Fox network. There were 18 independent VHF stations and an additional 8 VHF Fox affiliates in the top-50 markets in 1993; further, there were 25 independent VHF stations and an additional 22 VHF Fox affiliates nationwide. There were 152 "independent" Fox primary affiliates nationwide.[95] These "independent" stations appear to do extremely well financially, as Figure 16 suggests.

94 FCC, Notice of Proposed Rule Making, MM Docket 94-123, released Oct. 25, 1994, ¶45.

95 NIELSEN STATION INDEX, DIRECTORY, 1993-94. The considerable increase in the number of Fox's VHF affiliates is worth noting. Compare Table 1, *supra*.

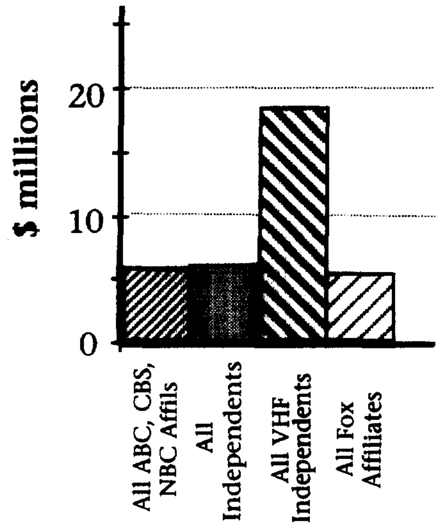
Figure 16 **Average cash flow of U.S. television stations, by network affiliation**[96]



Many independent stations artificially "protected" by the Rule are highly profitable, as the data in Figure 17 indicate, both on an absolute basis and compared to affiliates of ABC, CBS and NBC. The average financial performance of VHF independents far exceeds that of ABC, CBS and NBC affiliates. This difference should not be surprising, because the VHF independents tend to be in larger markets than the average affiliate. This comparison is appropriate, however, as PTAR attempts to benefit all independents at the expense of all affiliates, without regard to their actual financial circumstances. Continuing to insulate these successful independent stations from competition is no longer necessary and cannot be justified on any legitimate public policy basis.

96 Source: Appendix A, Table A-12.

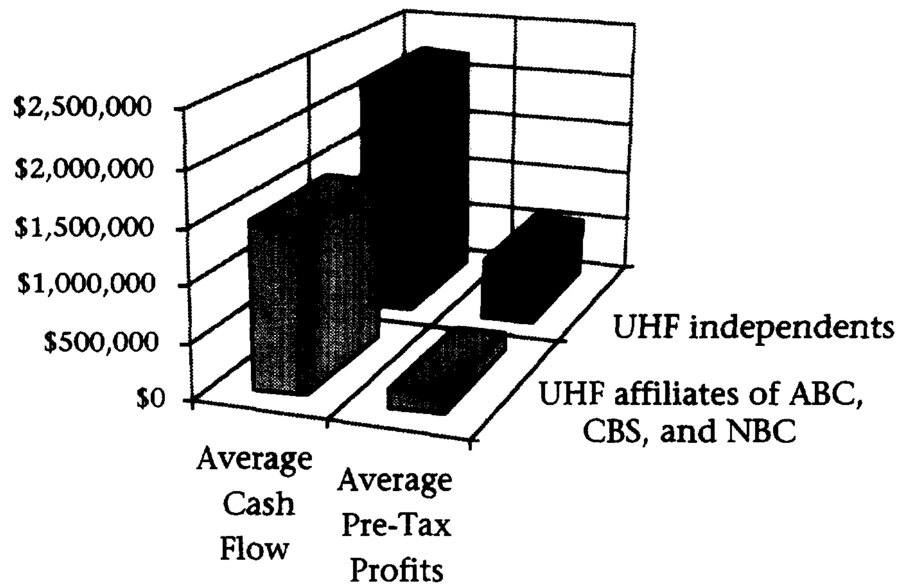
Figure 17 **Average cash flow of independent and affiliated television stations**[97]



Similarly, it is difficult to justify competitive insulation for allegedly weaker UHF independents when much of the cost of that insulation falls on UHF affiliates of ABC, CBS and NBC. UHF network affiliates are denied the right to broadcast first-run network programming during the access period. Figure 18 below demonstrates that a policy of favoring one set of UHF stations (independents) at the expense of another set of UHF stations (ABC, CBS and NBC affiliates) cannot be supported by a supposed greater financial strength of UHF network affiliates. Independent UHF stations tend to have better financial performance than UHF network affiliates because the independent UHF stations are found in larger markets than the average affiliate. PTAR ignores such factors in its attempt to benefit all independent stations relative to affiliated stations.

97 Source: Appendix A, Table A-12. Includes all ADI markets.

Figure 18 1992 UHF station profitability[98]



Similarly, insulation of weaker, marginal independent stations makes no sense if it is at the cost of viewer welfare. While it is surely true that handicapping network affiliates helps independents, there is no evidence that the Rule has been crucial to the survival of any independent station.[99] Indeed, because the Rule's impact is restricted to one hour of the broadcast day, half of which had no network programming in the years prior to the Rule, it is difficult to see how such evidence could exist. Special insulation for UHF independents cannot be justified today given the great reduction or elimination of their "UHF handicap," referred to earlier and discussed in Appendix C. Moreover, there is no basis to believe that the long-run competitiveness or economic performance of the broadcasting industry has been significantly enhanced by those marginal independents, if any, that owe their existence to the artificial competitive advantage of PTAR.

---

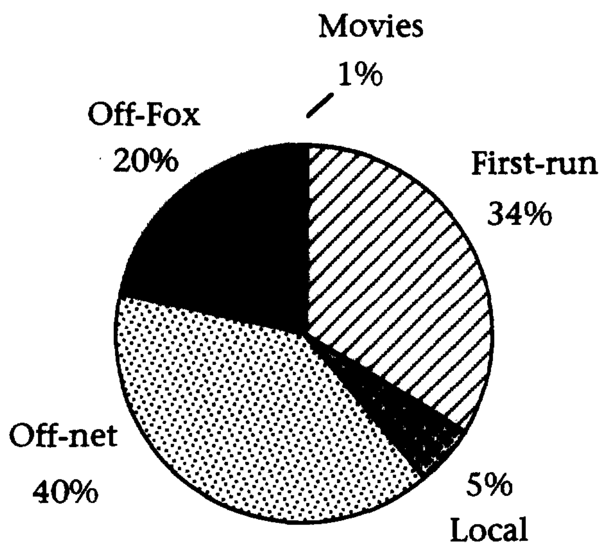
98 Source: Appendix A, Table A-16. UHF independents include Fox affiliates.

99 To put the matter somewhat more rigorously, it is doubtful that the marginal contribution of PTAR to independent station profitability has been sufficient to make the difference between viability and non-viability for any material number of stations.

Further, conferring advantages on independents is no longer necessary because of the explosion in new networks and media available to the viewing public.

The failure of many independents to take advantage of their special status to show off-network programming during the access hour also calls into question the need for PTAR as a means to afford a competitive advantage to independent stations in the top-50 markets. Off-network programming accounted for only 40 percent of programming hours by Fox affiliates and other independent stations in the top-50 markets during the access period. See Figure 19.

Figure 19 **Access hour broadcasts of top-50-market independents, by source**[100]



If independent stations are at a disadvantage today, that disadvantage is largely attributable to the success of ABC, CBS and NBC affiliates, a success based entirely on competitive merit. Because of their affiliation with national networks with high penetration, ABC, CBS and NBC affiliates can attract larger audiences with higher quality network programming. There is

100 Includes Fox affiliates. Source: Appendix H.

nothing regrettable about this from a public policy perspective. Broadcast networks take advantage of efficiencies to distribute programming with greater viewer appeal. PTAR handicaps these networks and their affiliates by restricting the realization of these efficiencies and thereby harms viewers, advertisers, the production industry, and society as a whole. PTAR provides no compensating benefits to any but special interest groups made up of well-off independent stations and successful game show and news magazine producers.

D. Diversity is not enhanced by PTAR

From the beginning, supporters of PTAR have attempted to justify the Rule by arguing that it promotes diversity.[101] Diversity concerns cannot justify retaining PTAR. This section shows that PTAR does not increase diversity. Even if PTAR were marginally to promote diversity, economic forces other than PTAR have now created so much diversity that there is no longer any need for PTAR.

In a recent Notice, the Commission identified three relevant types of diversity: viewpoint, outlet and source.[102] Viewpoint diversity apparently is synonymous with diversity of program content, because the Commission uses its now-defunct program content regulations to illustrate "direct" regulation of viewpoint diversity.[103] These "direct" regulations required broadcasters to offer minimum amounts of various program types, and to present a variety of viewpoints, but did not require broadcasters to offer access to others. Outlet diversity "refers to a variety of delivery services (*e.g.*, broadcast stations) that select and present programming directly to the public."[104] Source diversity "... refers to ensuring a variety of program produc-

---

101 For instance, see FCC Report and Order adopted May 4, 1970, ¶21, ¶23 and ¶25.

102 FCC, Further Notice of Proposed Rule Making, MM No. 91-221 & 87-8, Released Jan. 17, 1995, ¶¶53-80.

103 *Id.* ¶¶57-59.

104 *Id.* ¶61.

ers and owners."[105] According to the Commission, "... the Prime Time Access Rule [was] designed to foster 'source' diversity ..."[106] Finally, according to the Commission, its "core concern with respect to diversity is news and public affairs programming especially with regard to local issues and events."[107]

1. Outlet diversity

Outlet diversity is measured by the number of independent "gatekeepers" controlling what is available to consumers. To be an effective source of diversity it is not necessary that any given consumer or any threshold fraction of consumers actually subscribe to, see or hear the messages of any given outlet; the reasonable availability of options is sufficient.

Diversity of outlets for individual viewers has not been enhanced by PTAR. The number of stations in the viewer's market determines the broadcast television options available to each viewer. Each station typically provides programming that is different from the others, and viewers can choose among them.[108] PTAR has the effect of prohibiting network affiliates from showing network programming during the access period; moreover it restricts network affiliates in the top-50 markets from showing off-network programming. In no way does this restriction increase the number of options available to a viewer. Consequently, PTAR has no effect on the diversity of outlets for individual viewers. From the perspective of an individual viewer, PTAR did not change the number of "gatekeepers" governing the options available on broadcasting television.[109] Instead, it *reduced* the number of programming sources available to the gatekeepers.

---

105 *Id.*

106 *Id.*

107 *Id.* ¶72.

108 Some PBS stations in the same market duplicate programs.

109 In principle, PTAR might have increased the number of gatekeepers, and therefore outlet diversity, in those markets where the slight increase in independent station profitability due to PTAR made the difference between having one more independent station and not having one. There is no evidence that any such markets exist.

Although the diversity of broadcast television options available to a viewer is limited by the number of stations, there has been enormous growth in the number of independent commercial stations since 1970. See Figure 3. In 1993, the average television household could receive 13.3 stations.[110] PTAR may have increased slightly the profitability of independent stations by insulating them from the competition of network affiliates. However, the growth in the number of independent stations is explained chiefly by an increase in the demand for television advertising, changes in FCC television spectrum management policies, and the reduction or elimination of the UHF handicap. The growth would have occurred even had there been no PTAR. Furthermore, most viewers today have access to cable programming, VCRs and two DBS services, which further increase the number of viewing options. Future developments, including VDT, will further expand the options available to many viewers. Even if there had been a need to increase outlet diversity at the time PTAR was instituted, PTAR would now be obsolete because that need has been filled many times over.

In short, because local stations decide what programming to broadcast and with what network to affiliate, there are as many independent sources of broadcast programming as there are local stations in each market. As PTAR has done nothing to affect the number of local stations, it has had no effect on outlet diversity.

2. Source diversity

Contrary to what might have been hoped by the architects of PTAR, broadcasters themselves do not face a greater diversity of program sources. First-run programming in the access period has not been produced by a broad, diverse set of firms. Just as in the case of network distribution, to produce popular shows profitably syndicators need to clear a relatively large number of stations. The importance of scale economies dictates that relatively few first-run shows can be profitable in the access period. In practice, three program suppliers account for 89 percent of non-news and public affairs

---

110 NIELSEN MEDIA RESEARCH, TELEVISION AUDIENCE 1993, at 9.

programming shown on affiliates in the top-50 markets during the access period. See Appendix H. These scale economies are what leads the broadcast networks to seek affiliations in as many markets as possible. But syndicators do not offer as much programming, tend to have less stable relationships with their customers, have lower audience reach than ABC, CBS and NBC, and cannot offer advertisers the same range of availabilities. Consequently, the syndicators do not enjoy all the efficiencies of networks and so cannot afford to produce as much high-cost, popular programming as the networks do.

The Commission in 1970 used the image of a (single) "funnel" to describe ABC, CBS and NBC. The funnel was intended to suggest that the broadcast networks stood between the program suppliers and packagers and the stations, restricting the source diversity available to stations. From an economic point of view it is difficult to make sense of this. The economic structure that the Commission faced was created, on the one hand by the Commission's own spectrum policies, and, on the other, by a marketplace in which broadcast stations chose network affiliation in preference to the purchase of programs from syndicators. Nothing prevented syndicators or local producers from making deals with stations; it simply was more profitable, at least in prime time, for the affiliates to broadcast network programs than non-network programs.

Networks select the programs to offer their affiliates; in this sense they are "gatekeepers" vis-à-vis the affiliates, just as the affiliates are gatekeepers vis-à-vis the viewers. Yet the affiliates always have had the option of buying their programming elsewhere. In this sense, the number of sources is as great as the number of potential suppliers. When a station exercises one of many options it makes little sense to say that its own choice has restricted its options.

3. Viewpoint diversity

PTAR also was intended to foster diversity of viewpoints (program content). It was hoped that restricting networks' ability to program would create a greater variety of programs. There is no reliable way to measure the diversity of program content or viewpoints, so it is impossible to state definitively whether PTAR has achieved greater viewpoint diversity. But if there has been an increase in program diversity it is not at all obvious. The types of first-run programs shown during the access period—principally game and news magazine shows—were developed before PTAR and have been widely used during prime time outside the access period and in other dayparts. Indeed, several of the programs now most widely carried in the access period—including *Wheel of Fortune, Jeopardy! and Family Feud*—were developed as network programs.[111]

In at least one important sense, however, PTAR may have *reduced* diversity of program content. Before PTAR, during the portion of the access period programmed by the networks, it was most common to present a different program each night. Most of the first-run programs now shown by network affiliates in the access period have been "stripped," *i.e.*, the same program airs each weekday night, with a different game, edition or episode shown each night. If such "stripping" was caused or encouraged by PTAR, the number of different ideas being turned into television programming has probably been reduced.

As noted above, the Commission has stated that its "core concern with respect to diversity is news and public affairs programming especially with regard to local issues and events."[112] If the Commission's core diversity objective is to increase local news and public affairs programming, PTAR clearly has not been successful. During the first half of the access period, 7:00–7:30 p.m., affiliates of ABC, CBS and NBC showed local news and public affairs programming during 43 percent of all affiliate hours in the November 1994 sweep. This activity cannot be attributed to PTAR, however, since many affiliates broadcast local news during 7:00–7:30 p.m. even before PTAR. In contrast, affiliates offered very little local news and public

---

111 TIM BROOKS & EARLE MARSH, THE COMPLETE DIRECTORY TO PRIME-TIME NETWORK TV SHOWS 1946-PRESENT, (4th ed. 1988).

112 FCC, Further Notice of Proposed Rule Making, *supra* note 102, ¶ 72.

affairs programming during the second half of the access period, from 7:30–8:00 p.m.—only 2 percent of all affiliate hours. Fox affiliates and other independent stations devoted similarly small percentages of their time to news. During the access hour from 7–8 p.m., local news and public affairs programming accounted for only 3 percent of total Fox affiliate and other independent station hours. See Appendix H.

Moreover, if PTAR increases the profitability of independent stations, there is no reason to suppose that the stations use their higher profits to subsidize local news and public affairs programming. Broadcast stations have no reason (without Commission "direct" regulation of program content) to increase their broadcasts of news and public affairs because of increases in the profitability of entertainment programming. Indeed, the reverse may be true.

Since PTAR has caused no demonstrable increase in viewpoint or content diversity, it is unlikely that diversity would be reduced by the repeal of PTAR. Indeed, it is likely that without PTAR, first-run syndicated programming akin to that now being carried on ABC, CBS and NBC affiliates would simply air instead on independent stations. The use of first-run syndicated programming to compete with network programming during prime time demonstrates this point. As shown in Figure 15, first-run syndication accounts for 39 percent of the prime-time programming shown on non-Fox independents in the top-50 markets. If the affiliates of ABC, CBS and NBC were to show network programming during the access period, independents probably would counter-program with first-run syndicated programming.

Finally, it makes no sense to limit consideration of viewpoint diversity to what is available on television, let alone broadcast television. Consumers have available to them and consume many other types of video programming, the content of much of which in no way duplicates broadcast television programming. The emergence of more than 100 new cable networks and alternative media clearly makes the Commission's 1970 diversity concerns irrelevant today.[113] A subset of these cable networks provided in a representative week in 1995 over 11,000 hours of programming that did not originally appear on ABC, CBS or NBC.[114] Even though not all viewers subscribe to cable, DBS or other video media, these sources of diversity are reasonably available to them, just as print media are on the newsstand.

The enormous increase in video programming available through cable networks, home video and other sources has had a great role in expanding the diversity of video viewpoints. Cable networks have been created offering programming specializing in diverse subjects, from golf to gardening, and from science to science fiction. It is not credible to argue that PTAR is needed to increase content diversity, since viewers now have much more content diversity available to them than could ever be created by PTAR.

---

113 As noted above, the Commission in another proceeding has tentatively proposed to ignore the multiplicity of cable channels in terms of their contribution to viewpoint diversity because they are under the control of the cable operator. There are reasons to disagree with this view, including the difficulty of reconciling it with the Commission's long insistence that broadcasters, no less in control of what they offer the public than cable operators, can increase viewpoint diversity by reacting to various "direct" and "indirect" FCC regulations. *See* FCC, Further Notice of Proposed Rule Making, *supra* note 102, ¶¶53-80.

114 *See* Appendix A, Table A-15.

V. Conclusion

The Prime Time Access Rule, if it ever made sense as an element of sound economic policy, makes no sense today. The premise that ABC, CBS and NBC acted as one never had any basis. In any event, these networks' collective economic power no longer qualifies as "dominant" in an industry experiencing explosive growth of new entrants. Where there once were three broadcast networks, now there are six. Where cable television once provided only retransmission service, today it provides dozens of channels of original programming. The bargaining relationship between networks and local affiliates has shifted dramatically in the affiliates' favor. Neither ABC, nor CBS nor NBC dominated the purchase or production of prime-time programming before the Rule's adoption in 1970, and there is no sign that any of them could do so today. Further, all three of the new broadcast networks are vertically integrated into program production, and horizontally integrated into syndication.

Stations choose to affiliate with broadcast networks because in a competitive market they work diligently to provide superior service, taking advantage of the economies of networking to offer high-quality, popular programming to affiliates and viewers, and effective advertising vehicles to advertisers. To handicap the most successful broadcasters, as PTAR does, leads inevitably to a loss of economic efficiency and consumer welfare. While this is difficult to measure, one indication of the cost of the Rule is the loss of audience in the access period after the Rule became effective. Nearly 600,000 television households by the most conservative estimate, and more likely 1.25 million, *turned off their sets* rather than watch the material that was substituted for network first-run shows in the access period. The overall welfare loss, by one measure, exceeds $200 billion over the past 25 years. The Rule created a restriction of output that has been no less anticompetitive in its effects than an agreement in restraint of trade. Further,